REPRESENTATIONS AND WARRANTIES.

In a recent case, *Morley v. Consolidated Mfg. Co.*, 81 N. E. 63, the Massachusetts court has applied the rule of *caveat emptor* more strictly than hitherto. In making this ruling, the court has departed from certain authorities which have had occasion to deal with the exact words and phrases, used by the salesman in the case considered. In this case, the plaintiff purchased a machine, paying therefor about half the price of a new one of the same make, fully understanding that it had been used as a demonstrating car, but the salesman had said that "it was in first-class condition, and all right." The machine was used by the plaintiff about two months when the crank-shaft broke and materially damaged the engine. He endeavored to recover back the purchase price, relying on the assertions of the salesman, but the Supreme Court denied his right to do so, stating that "There was no express warranty. All that was said as to the value and nature of the machine was mere seller's talk." Further than that, the court denied that there was any implied warranty.

If the decision is correct in that the words do not amount to a warranty, it necessarily follows, in the absence of fraud on the part of the vendor, that the strict rule of *caveat emptor* must apply, in which case the vendee is considered to have assumed the risk of the durability of the crank-shaft and cannot recover the purchase price from the vendor.

Wilson v. Lawrence, 139 Mass. 318, relied upon by the court, was a case for breach of warranty in the sale of a piano, which was ordered by the plaintiff, although he had not demanded one of any particular class or quality, and the court held that in the absence of any definite description of the instrument ordered the defendants were bound only to furnish a piano which was merchantable and salable and not one which should be free from future defects. This case does not seem to bear as directly on the words used in the main case as some others to be noticed. Indeed, one distinction between the two cases is that the automobile was purchased, it seems, under circumstances which gave the vendee the opportunity of personal inspection, while the order in the other case was sent to the factory, and no specific article was in the minds of both parties, so that the representations of the salesman of the automobile were as to one particular machine which the vendee contemplated buying. This would give the result that the representations of the salesman as to the automobile could not possibly apply to any other machine, while there existed more or less uncertainty as to the piano which was the subject of sale in the other case. The general rule that goods sold by sample must correspond accurately and exactly has been strengthened by statutes in many states, and fraud is presumed by setting up the receipt of goods different from those ordered by sample.

To consider the effect of the words as used by the defendant, *Richardson v. Grandy*, 49 Vt. 22, seems to be quite analogous to the main case. There, a piece of machinery was sold by the defendant to the plaintiff which was admittedly second-hand, but was to

"be equal in all respects to a new one of the same kind," and the court held this to be a sufficient warranty for the plaintiff to maintain an action upon. The court said: "While it is true that representations descriptive of the thing sold, or which may be taken as expressive of the opinion of the vendor, do not necessarily import a warranty, yet, where representations are made by the vendor of the quality of the thing sold, or its fitness for a particular purpose, if intended as a part of the contract of sale, and the vendee makes the purchase, relying upon such representations, they will in law constitute a contract of warranty." It seems entirely reasonable to suppose that the buyer of the automobile relied on the representations that it was all right and in first-class condition, when it was expressly so stated, even though it was a second-hand machine.

No doubt the authorities all agree upon the general rule that mere words of praise or commendation, or which merely express the vendor's belief, judgment, or opinion or estimate do not constitute a warranty, *Benj. on Sales,* 7th Ed. p. 664; *Long on Sales,* 2nd Am. Ed. p. 125, but there is a very strong line of authorities which hold that a positive affirmation of a material fact, as fact, intended to be relied on as such, and which is so relied upon, constitutes in law a warranty, whether the vendor mentally intended to warrant it or not and the intention is immaterial.

In *Potomac Steamboat Co. v. Hardlan & Hollingsworth Co.,* 66 Md. 42, there was a contract to build a steamboat, the machinery of which was "to be of the best material and the workmanship first-class." Yellott, J., said in delivering the opinion of the court: "It may not be denied that an express affirmation of quality intended to operate on the mind of the vendee as an inducement to make a purchase, and so operating constituted a warranty. The rule of law is that any affirmation of the quality of the article, made at the time of the sale, intended as an assurance of the fact stated and relied on and acted on by the purchaser, will constitute an express warranty.

The Kentucky Court by Judge Holt has said: "A review of the cases as to what constitutes a warranty, exhibits much learning and diversity of opinion. Indeed, they cannot all be reconciled." Here he cited an early case in which the rule was laid down that a mere representation or affirmation, however positive, as to the character or condition of an article, could not constitute a warranty and commented upon this rule in these words: "It adhered to form rather than reason, and the argument was of doubtful legal morality." And again he said: "business and trade forbid much technicality. Warranties enter largely into the trade of the country and it is proper and best for its fairness and promotion that the language used by those so engaged should in law receive its common acceptation, and be construed as ordinarily understood by them. One man is selling his horse to another and when particularly asked, he says, 'he is all right,' would not the purchaser understand this as embracing the question of soundness and would not the vendor be understood as thereby saying to him in effect: 'he is sound?'" *McClintock v. Emick, Stoner & Co.,* 87 Ky. 160.

Application of the dictum of Judge Holt to the case in question

leads to the fact that the words "all right" and "in first-class condition" should be construed as an assertion which the maker should be willing to answer for, provided such would be the usual business meaning.

In an English case Lord Holt was quoted as correctly saying that "an affirmation at the time of the sale is a warranty, provided it appear on evidence to be so intended," *Pasley v. Freeman,* 3 T. R. 57, and the Massachusetts court may have had evidence before it which would show that the words were not intended to have binding effect, or the jury may have so determined, but the question whether the buyer relied upon the statements is not discussed in the opinion. The court may have felt that the circumstances showed that the vendee could not have relied upon the salesman's word in which case the court was following the strict rule frequently laid down by English and American decisions.

However this may be, if the vendee had placed confidence and reliance on the words "first-class condition" and "all right," the decision means that "seller's talk" is favored by the courts and the ordinary purchaser would be unsafe in attempting to rely on anything short of a written guarantee or an unequivocal statement from the vendor. We believe that the ordinary understanding of the words used would mean that the seller intended to be answerable and that any other construction would give him an undue advantage over the purchaser.